Supreme Court, U.S.
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No. 88-736

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

EVELYN WANKOFF,
ADMINISTRATRIX OF THE ESTATE OF
IRVIN WANKOFF, DECEASED AND
EVELYN WANKOFF IN HER OWN RIGHT,
Petitioner

v.

THOMAS TIBBS AND CONSOLIDATED
FREIGHTWAYS CORPORATION
and
THOMAS JEFFERSON UNIVERSITY
HOSPITAL, ADDITIONAL DEFENDANT,
Respondents

BRIEF OF RESPONDENT THOMAS JEFFERSON UNIVERSITY HOSPITAL IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania, Eastern District

James M. Penny, Jr.*
Rex R. Gary
OBERMAYER, REBMANN, MAXWELL
& HIPPEL
14th Floor, Packard Bldg.
Philadelphia, PA 19102
(215) 665-3178
Attorneys for Respondents

*Counsel of Record

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Whether the Supreme Court of the United States has jurisdiction to consider the federal question raised by petitioner since neither the decision below nor the record raises the federal question in the Petition.

2. Whether a state court has the inherent power to enter a judgment of non pros against a civil claimant where that claimant has failed to prosecute her case with due diligence.

3. Whether there exist special and important reasons for this Court to review a state court's exercise of its discretion in dismissing petitioner's negligence action for failure to prosecute with due diligence.

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BRIEF FOR THOMAS JEFFERSON UNIVERSITY HOSPITAL IN OPPOSITION

Opinions Below

The Respondent Thomas Jefferson University Hospital respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Superior Court of Pennsylvania. By that opinion, the Superior Court of Pennsylvania affirmed the order of the Court of Common Pleas of Philadelphia County granting a judgment of non pros in favor of respondent and against petitioner. The opinion of the Superior Court can be found at pages A-5 to A-12 of petitioner's petition. The opinion of the Court of Common Pleas can be found at pages A-14 to A-17 of petitioner's petition. The Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied with no opinion issuing.

Jurisdiction

The Court has no jurisdiction to review the federal constitutional issues raised by petitioner since the federal questions involved were neither timely raised nor decided in the state courts of the Commonwealth of Pennsylvania. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Statement of the Case

On October 31, 1979 petitioner and petitioner's decedent filed a Complaint in Trespass against Thomas Tibbs and Consolidated Freightways Corporation ("co-defendants"). In that Complaint, it was alleged that petitioner's decedent, Irvin Wankoff, was injured when he was struck by a truck driven by co-defendant Thomas Tibbs, and owned by co-defendant Consolidated Freightways Corporation as the truck was backing out of the

property of respondent Thomas Jefferson University Hospital. Respondent was not an original party. On February 25, 1980, the deposition of William Cox was taken. Mr. Cox was a security guard employed by respondent. Mr. Cox was an apparent eyewitness to this accident which occurred on June 12, 1978. Mr. Cox was allegedly involved in directing the truck as it was backing into the street.

On March 20, 1980, the depositions of two eyewitnesses, Lorna Shurkin and Jean Gray, were taken. These depositions, were attended by counsel for the petitioner and by counsel for co-defendants only. Co-defendants filed a Petition for Leave to Join respondent on March 15, 1980. The Complaint against respondent was filed on or about May 1, 1980.

The deposition of the petitioner's decedent was taken on July 21, 1980 and attended by counsel for all parties. The deposition of co-defendant Thomas Tibbs was taken on August 7, 1980 and attended by counsel for all parties. On August 15, 1980, respondent filed Preliminary Objections to Defendants' Complaint. Petitioner, on August 20, 1980, filed an application for extension of time to certify the action for trial. On or about October 1, 1980, it was ordered that the time to file a Certificate of Readiness was extended to December 31, 1980. Thereafter, on December 11, 1980, the Preliminary Objections of respondent were overruled. Respondent filed its Answer to co-defendant's Complaint and filed a Crossclaim against co-defendants on or about February 4, 1981. No Certificate of Readiness was ever filed by petitioner.

Petitioner's decedent, Irvin Wankoff, died due to causes unrelated to the accident on March 24, 1983. On February 7, 1986, petitioner filed, through her counsel, a suggestion of death substituting the personal representative of the estate of the original plaintiff. This was the first docketed action in this matter since July of 1981.

On June 20, 1986, five and one half years after the expiration of the court-granted extension period for filing a Certificate of Readiness, petitioner filed a Petition for Leave to File a Certificate of Readiness[1] nunc pro tunc. Respondent and co-defendants answered the Petition and moved for judgment of non pros. On August 20, 1986, the trial court entered an order denying the petition and ordered a judgment of non pros. The matter was appealed to the Superior Court of Pennsylvania. The questions presented in petitioner's brief to that court were as follows:

> I. Whether the court below abused its discretion in not granting the Appellant's Petition for Leave to Refile a Certificate of Readiness.
>
> II. Whether the court below abused its discretion in ordering a judgment of non pros.

The Superior Court found that petitioner demonstrated a want of due diligence, that oversight of counsel was not a sufficient excuse, and that the delay prejudiced the other parties to the case. (Pet.App. A-10, A-11). No federal question was addressed by the court.

Petitioner subsequently filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania never entertained petitioner's petition and ultimately denied the Application for Reconsideration on July 28, 1988.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither the decision below nor the record timely raises the federal question presented in the Petition.

The federal question raised in the Petition is whether the Commonwealth of Pennsylvania deprived

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1. Pursuant to local rule of Court, former Philadelphia Rule of Civil Procedure 151, petitioner was required to file a Certificate of Readiness on or before August 31, 1980.

the petitioner of a constitutionally protected interest to have "her day in Court on the merits". The only constitutional provision cited by petition in support of her argument is the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Since the decision below did not address this question and since this question has not been raised in a timely manner, the Court has no jurisdiction to consider the Petition.

It has long been mandated that the jurisdiction of the Supreme Court under 28 U.S.C.A. §1257 is not triggered unless a substantial federal question has been properly raised in the state court proceedings. *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). *See, Crowell v. Randell,* 10 Pet 368, 9 L.Ed. 458 (1836).[2]

Further, raising the federal question for the first time in a petition for rehearing addressed to the highest state court in insufficient to confer jurisdiction unless the Court actually entertains the petition and expressly decides the question. *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 128 (1945).

The opinion of the Superior Court of Pennsylvania is devoid of any indication that petitioner ever properly raised a constitutional challenge to the entry of non pros. The Superior Court applied the established three-part test in Pennsylvania for dismissing cases for want of prosecution[3] and ruled that the lower court properly

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2. In *Crowell,* Justice Story discussed the earlier cases regarding the issue of the Court's jurisdiction under §25 of the Judiciary Act of 1789, the lineal ancestor of §1257, and concluded that the Court had no jurisdiction unless a federal question was raised and decided by the state court.

3. "A [trial] court properly enters a judgment of non pros when a party to the proceedings has shown a want of due diligence by failing to proceed with reasonable promptitude, when there has been no compelling reason for the delay, and when the delay has caused some prejudice to the adverse party". *Cathcart v. Keene Industrial Insulation,* 324 Pa.Super 123, 471 A.2d 493, 498 (1984).

exercised its discretion. No issue regarding the *constitutionality* of the action taken was addressed by the lower courts.[4] The Supreme Court of Pennsylvania never entertained the petition.

Moreover, the record is barren of any indication that the federal question was raised in a timely manner. Rule 302(a) of the Pennsylvania Rules of Appellate Procedure provides that "Issues not raised in the lower court are deemed waived and cannot be raised for the first time on appeal". This rule is applicable to issues of constitutional dimension. *Commonwealth v. Hawkins*, 295 Pa.Super, 429, 441 A.2d 1308 (1982). Failure to follow state appellate channels for the preservation of issues is fatal to Supreme Court review. *See, e.g., Beck v. Washington*, 369 U.S. 541, 553 (1962).[5]

Thus, petitioner has failed to raise in any manner below, the federal question she now presents. By so doing, petitioner has deprived the Commonwealth of Pennsylvania from determining this issue and, accordingly, has removed any basis for this Court's jurisdiction.

2. There exist no special or important reasons for the grant of certiorari since the lower court appropriately exercised its power and discretion in ordering a judgment of non pros.

a. The power of a court to dismiss a case with prejudice because of plaintiff's failure to prosecute has withstood constitutional scrutiny by this Court. In *Link*

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4. *Illinois v. Gates*, 463 U.S. 213, 221 (1982), this Court stated, "Likewise, 'due regard for the appropriate relationship of this Court to state courts' *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. at 434, 435, 60 S.Ct. at 673, demands that those courts be given an opportunity to consider the constitutionality of state officials, and, equally important, proposed changes in existing remedies for unconstitutional actions".

5. Petitioner, in *Beck*, failed to list the federal issue in his "assignment of errors" in his brief filed in the state supreme court or to argue the point in his brief.

v. Wabash Railroad Company, 370 U.S. 626, 630 (1962), it was recognized that a court's power to dismiss for lack of prosecution is an inherent power governed by the necessary control vested in Courts to manage their own affairs and achieve the orderly disposition of cases.[6] Even the absence of notice as to the possibility of dismissal or the failure to hold an adversarial hearing does not necessarily render the dismissal void. *Id.* at 632. "The adequacy of notice and hearing respecting proceedings that may affect a party's right turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have the consequences of his own conduct". *Id.* at 632.

It follows that any claim by the petitioner directed to the *power* of the courts of the Commonwealth of Pennsylvania to order a non pros is patently frivolous and not worthy of review. Petitioner inappropriately relied upon the case of *Logan v. Zimmerman Brush Company,* 455 U.S. 420 (1982). There exists a critical destruction between the *Logan* case and the instant matter. In *Logan,* the petitioner was deprived of an *opportunity* for a hearing by virtue of an administrative error although the petitioner had pursued his claims in a timely manner. Here, petitioner waited more than five years, while under an affirmative duty to certify the status of this case, before taking any step looking toward litigation. This inexcusable recalcitrance was appropriately recognized in the courts below.

b. The court below fully considered and decided the issues in a manner consistent with the existing law in Pennsylvania. Like the Supreme Court of the United States, the Supreme Court of Pennsylvania has long recognized that "[a]s a matter of fairness, one who

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6. *See also, Carnegie Mellon University v. Cahill,* ____ U.S. ____, 100 S.Ct. 614, 624 (1988) ("Courts have historically possessed an inherent power to dismiss suits for discretionary reasons such as failure to prosecute").

brings another into Court should prosecute the claim against him with reasonable diligence" *Hruska v. Gibson*, 316 Pa. 518, 521, 175 A.514 (1934). *See also, Potter Title & Trust Company v. Frank*, 298 Pa. 137, 141, 148 A.50 (1929).

The Supreme Court of Pennsylvania has addressed the circumstances under which this discretion may be properly exercised. The judgment of non pros is appropriate when a party to the proceedings: (1) has shown a want of due diligence in failing to proceed with reasonable promptitude; (2) there has been no compelling reason for the delay; and, (3) the delay has caused prejudice to the adverse party. *James Bros. Co. v. Union Banking Co.*, 432 Pa.129, 247 A.2d 587, 589 (1968); *Manson v. First Natl. Bank*, 366 Pa. 211, 215, 77 A.2d 399 (1951); *Hruska v. Gibson, supra*, 316 Pa. at 519. This test has been applied in numerous decisions of the Superior Court of Pennsylvania. *See, e.g., Cathcart v. Keene Industrial Insulation*, 324 Pa.Super. 123, 471 A.2d 493 (1984); *Carter v. Amick*, 246 Pa.Super. 530, 371 A.2d 961 (1977); *Kennedy v. Bulletin Co.*, 231 Pa.Super 66, 346 A.2d 343 (1975).

In reaching its decision below, that the Superior Court of Pennsylvania appropriately applied the above-stated principles. More than five years passed since there was any docketed activity and since there was any activity on petitioner's part looking toward litigation. Further, petitioner contended that the "compelling reason" for the lengthy delay was the "technical oversight" on the part of associate attorneys handling the case and the "extraordinary volume of work and other confusion created in counsel's office and throughout the entire legal community surrounding the relatively short lived 240 day rule". The court appropriately noted that the oversight and negligence of counsel is not an acceptable excuse and such an excuse failed to adequately address why five years passed before any action was taken in this litigation. Finally, the Superior Court appropriately

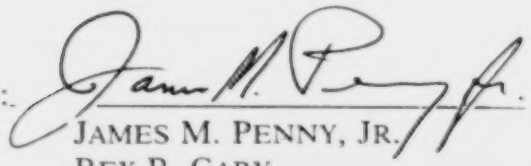
determined that defendants were prejudiced by the delay. The potential dimming of witnesses' memories is an appropriate consideration in assessing prejudice in this context. *See, Talbot v. Delaware County Trust Co.*, 384 Pa. 85, 119 A.2d 518, 519 (1956); *American Bank & Trust Company of Pennsylvania v. Ritter, Todd & Haayen*, 274 Pa.Super. 285, 418 A.2d 408, 410 (1980).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

OBERMAYER, REBMANN,
MAXWELL & HIPPEL

BY: 

JAMES M. PENNY, JR.
REX R. GARY
14th Floor, Packard Bldg.
Philadelphia, PA 19102

Attorneys for Respondent
Thomas Jefferson University
Hospital